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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 21

HERMAN C. GROMAN, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1937.

CERTIORARI GRANTED MAY 24, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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—9151-C

1 Herman C. Groman,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 62930

Appearances:

For Taxpayer: David L. Krebs, Jr. Esq.

For Comr.: Elden McFarland, Esq., Walter W. Kerr, Esq.

DOCKET ENTRIES.

Transferred to Mr. Black 6/14/35.

1932.

Mar. 17—Petition received and filed. Taxpayer notified. (Fee paid)
Mar. 17—Copy of petition served on General Counsel.
Apr. 26—Answer filed by General Counsel.
May 3—Copy of answer served on taxpayer. General Calendar.

1933.

Apr. 3—Hearing set May 3, 1933.
Apr. 13—Motion for circuit hearing at Chicago filed by taxpayer. 4/15/33 granted.

1934.

Jan. 18—Hearing set for week of 3/5/34 at Chicago Ill.
Mar. 6—Hearing had before Mr. Goodrich, Div. 11 on merits. Motion to consolidate Dockets 62930 to 37 inc. granted. Commissioner's brief and petitioner's brief filed at hearing.
Mar. 26—Transcript of hearing of 3/6/34 filed.

1935.

Jun. 17—Memorandum opinion rendered, Mr. Black, Decision will be entered under Rule 50.
Jul. 18—Notice of settlement filed by General Counsel.
July. 20—Hearing set August 7, 1935 on settlement.
Aug. 7—Hearing had before Mr. Black on settlement under

Rule 50. Not contested—referred to Mr. Black for decision.
Aug. 7—Consent to settlement filed by taxpayer.
Aug. 8—Decision entered, Div. 15, Eugene Black.
Oct. 30—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.
Nov. 5—Proof of service filed by General Counsel.
Nov. 8—Proof of service of petition for review filed.
Dec. 10—Motion for extension to Jan. 29, 1936 to settle evidence and transmit record filed by General Counsel.
Dec. 10—Order enlarging time to Jan. 26, 1936 for preparation and delivery of record entered.

1936.

Jan. 21—Praecipe with proof of service thereon filed by General Counsel.
Jan. 29—Order enlarging time to March 2, 1936 for transmission and delivery of record entered.

Mar. 17, 2 BEFORE THE UNITED STATES BOARD OF TAX APPEALS.

Herman C. Groman,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 62930

PETITION.

Filed March 17, 1932.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:D-1:-SAW-60 D. dated January 19th, 1932, and as the basis of his proceeding alleges as follows:

1. The petitioner is an individual with his residence at 7 Wildwood Road, Hammond, Indiana.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 19th, 1932.

3. The taxes in controversy are income taxes for the calendar year 1929 and for seven thousand four hundred twenty and five one-hundredths dollars ($7,420.05).

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

In treating as taxable income the value of certain shares of stock of a corporation a party to a reorganization,
3 received in exchange for shares of another corporation previously owned by petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Metals Refining Company was an Indiana corporation having an authorized capital stock of five hundred thousand dollars ($500,000) consisting of five thousand (5000) shares of a par value of One Hundred Dollars ($100) each, of which four thousand four hundred twenty one (4421) were issued and outstanding at January 29, 1929.

(b) Petitioner was on January 29, 1929 and for more than two years prior thereto the owner of five hundred (500) shares of the capital stock of said Metals Refining Company, the cost of which shares to petitioner was Forty-thousand three hundred fifty dollars ($40,350).

(c) The Glidden Company is, and was on January 29, 1929, a corporation organized and existing under the laws of the State of Ohio.

(d) Metals Refining Company was engaged in the business of refining lead and in the production of various alloys. The Glidden Company is and was engaged principally in the manufacture of paint and varnish.

(e) On January 29, 1929, the petitioner and all the other stockholders of Metals Refining Company entered into an agreement with The Glidden Company for the acquisition by a corporation to be organized by it of all of the capital
4 stock of said Metals Refining Company through the exchange of the entire capital stock of Metals Refining Company for cash, preferred stock of The Glidden Company and non-voting preferred stock of the corporation to be formed by it, which last mentioned preferred stock was to be guaranteed by The Glidden Company, both as to cumulative dividends payable quarterly at the rate of 6% per annum and as to redemption at par value on or before four (4) years from the date of issuance, all of the common and voting stock of the company so to be formed to be purchased for cash and to be owned by The Glidden Company.

(f) Pursuant to said agreement, The Glidden Company caused the formation under the laws of the State of Oho, of a corporation by the name of Metals Refining Company of Ohio, having both preferred and common stock, all of which preferred stock consisting of five thousand (5000) shares was

guaranteed by The Glidden Company, both as to dividends and principal, by an agreement dated March 22nd, 1929, with First Trust & Savings Bank of Hammond, Indiana, as Trustee for the shareholders of Metals Refining Company, an Indiana corporation, and all of which common and voting stock was acquired by The Glidden Company.

(g) Thereafter, in compliance with said agreement of January 29, 1929, The Glidden Company, in exchange for five hundred (500) shares of the capital stock of Metals Refining Company, an Indiana corporation, owned by petitioner, transferred to Metals Refining Company of Ohio, caused the transfer to petitioner of five hundred ninety-six (596) shares of its own preferred stock and caused to be paid to petitioner the sum of seventeen thousand two hundred ninety-three and fourteen one-hundredths dollars ($17,293.14) in cash and to be issued to petitioner five hundred sixty-five (565) shares of the 6% Guaranteed Preferred Stock of Metals Refining Company of Ohio.

(h) In determining the basis for exchange of Metals Refining Company stock for cash and securities, the goodwill of Metals Refining Company was fixed by the agreement of January 29, 1929, at a value of five hundred thousand dollars ($500,000) and in the consummation of said agreement was in fact so treated.

(i) Petitioner filed his income tax return for the year 1929 with the Collector of Internal Revenue at Indianapolis, Indiana, including therein as income the amount of cash received in the consummation of the exchange hereinbefore described.

(j) Regular quarterly dividends upon the preferred stock of Metals Refining Company of Ohio, payable at the rate of 6% per annum have been paid by The Glidden Company.

Wherefore, The petitioner prays that this Board may hear the proceeding and redetermine the tax liability of petitioner, after holding that the exchange herein mentioned was pursuant to a plan of organization and that the profit derived therefrom by petitioner was not in excess of the amount of cash received by petitioner.

Respectfully submitted,

DAVID L. KEEBS, JR.,
Counsel for Petitioner,
Address: Armour and Company,
Union Stock Yards,
Chicago, Illinois.

State of Indiana, } ss.
County of Lake. }

HERMAN C. GROMAN, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein; and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

HERMAN C. GROMAN.

Subscribed and sworn to before me this 11th day of March, 1932.

FLORENCE L. CHAPMAN,
(Seal) *Notary Public.*

My commission expires 5/24/35.

NP-2-28

7 TREASURY DEPARTMENT

Washington

Office of
Commissioner of Internal Revenue

Jan. 19, 1932.

Address reply to
Commission of Internal Revenue
and refer to
Dr. Herman C. Groman,
7 Wildwood Road,
Hammond, Indiana.

Sir:

You are advised that the determination of your tax liability for the year (s) 1929 disclose a deficiency of $7,420.05, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington,

D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return (s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner,
By J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870

8 Statement.

IT:AR:D-1
SAW-60D

In re: Dr. Herman C. Groman,
7 Wildwood Road,
Hammond, Indiana.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$7,427.15	$7.10	$7,420.05

The report of the internal revenue agent in charge at Indianapolis, Indiana, covering an investigation of your books and records for the year 1929, has been reviewed and approved.

The information submitted at the conference held in the agent's office July 24, 1931, has been given careful consideration. From the evidence at hand and upon a literal construction of the reorganization features of the Revenue Act of 1928, it is held that a Glidden Company does not meet the statutory test as to "a party to a reorganization" as defined in section 112 (i)(1)(A) of the Revenue Act of 1928.

At the conference held in this office December 3, 1931, with your representative no new evidence was presented. Therefore, this letter of final determination is issued.

A synopsis of the adjustments follows:

Net income reported on return		$10,710.25
Add:		
1. Error corrected	$ 0.48	
2. Increased profits	79,873.14	79,873.62
Total		$90,583.87
Deduct:		
3. Loss allowed	$ 7,354.00	
4. Dividends	17,300.00	24,654.00
Net income adjusted		$65,929.87

Computation of Tax

Total net income adjusted		$65,929.87
9 Less:		
Dividends	$ 4,130.00	
Personal exemption and credit for defendants	4,700.00	8,830.00
Net income subject to normal tax		$57,099.87
Normal tax at ½% on $4,000.00		20.00
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $49,099.87		1,963.99
Surtax on $65,929.87		5,368.08
Total		$ 7,432.07
Less:		
Earned income credit		4.92
Tax liability		$ 7,427.15
Tax previously assessed		7.10
Deficiency		$ 7,420.05

Explanation of Changes.

1. To correct an error in computing income from business.
2. During 1929 you exchanged your common stock of the Metals Refining Company of Hammond, Indiana, for cash of $17,293.14; 596 shares of preferred stock of Glidden Company

of Cleveland, Ohio, and 565 shares of preferred stock of Metals Refining Company of Ohio. The transaction has been held taxable under section 112 (c)(1) of the Revenue Act of 1928.

The profit has been recomputed as follows:

Cash received	$ 17,293.14
596 shares Glidden Company preferred at $105.00	62,580.00
565 shares Metals Refining Company at $100.00	56,500.00
Total consideration	$136,373.14
10 Cost 500 shares Metals Refining Company of Indiana	40,350.00
Profit on exchange	$ 96,023.14

Profit taxable, not in excess of cash and fair market value of other property:

Cash	$17,293.14
Market value, Glidden Company stock	62.580.00
Profit taxable	$79,873.14

3. Inasmuch as the total value of Glidden stock was treated as equivalents to cash at $105.00 a share, the profit reported from the sale of 117 shares has been eliminated and the loss sustained on same together with the selling expense has been allowed in addition.

Amount of profit reported on sale of 117 shares eliminated	$7,020.00
Allowed: Loss on sale of 117 shares	234.00
Selling expense	100.00
Total	$7,354.00

4. The cash received $17,293.14 has been erroneously reported (in round figures) as dividends of $17,300.00 on your return. This amount has been eliminated and corrected as shown in #2 above.

A copy of this communication is being forwarded to your representative, Mr. Nelson T. Hartson, 810 Colorado Building, Washington, D. C., in accordance with authority conferred by the power of attorney on file in this office.

11 UNITED STATES BOARD OF TAX APPEALS. Filed Apr. 1932.

* * (Caption—62930) * *

ANSWER.

Filed Apr. 26 1932.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above named petitioner, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits the allegations contained in Paragraph 3 of the petition.

4. Denies error in the action recited in Paragraph 4 of the petition.

5 (A) to (J), inclusive. Denies each and every allegation of fact contained in Paragraph 5(A) to (J), inclusive, of the petition, which is inconsistent with and contrary to the determination of the Commissioner as stated in the notice of final determination of deficiency dated January 19, 1932.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

12 Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
MAXWELL M. MAHANY,
Special Attorney, Bureau of Internal Revenue.

June 17, 13 UNITED STATES BOARD OF TAX APPEALS.

Herman C. Groman,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Frank S. Betz,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Charles W. Wilson,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Mary Wilke, Executrix, Estate of William Wilke,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Erwin L. Wilke,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Martha Wilke,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

William Wilke, Jr.,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

C. H. Denning,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Docket Nos. 62930-62937.

David L. Krebs, Jr., Esq., for the petitioners.
Elden McFarland, Esq., for the respondent.

14 MEMORANDUM OPINION.

BLACK: These proceedings have been consolidated. Re-

spondent has determined deficiencies for the year 1929 as follows:

Herman C. Groman	$ 7,420.05
Frank S. Betz	7,042.65
Charles W. Wilson	349.49
Mary Wilke, Executrix, Estate of William Wilke	4,157.40
Erwin L. Wilke	11,255.08
Martha Wilke	585.47
William Wilke, Jr.	20,370.68
C. N. Dehning	897.86

One error common to all the proceedings has been assigned. It is stated in the petitions as follows:

> "The determination of tax set forth in the said notice of deficiency is based upon the following error:
>
> In treating as taxable income the value of certain shares of stock of a corporation, a party to a reorganization, received in exchange for shares of another corporation previously owned by petitioner."

The facts have been stipulated as follows:

Prior to January 29, 1929, all of the above-named petitioners were shareholders in the Metals Refining Company located at Hammond, Indiana. Metals Refining Company was an Indiana corporation having an authorized capital stock of $500,000.00 consisting of 5,000 shares of a par value of $100 each, of which 4,421 shares were issued and outstanding at January 29, 1929.

The Glidden Company is and was on January 29, 1929, a corporation organized and existing under the laws of the State of Ohio. Metals Refining Company was engaged in the business of refining lead and in the production of various alloys. The Glidden Company is and was engaged principally in the manufacture of paints and varnishes.

15 Under date of January 29, 1929, an agreement was executed by and between the Glidden Company of Cleveland, Ohio, and the holders of all of the outstanding stock of the Metals Refining Company (Indiana). The pertinent provisions in this agreement to the issue in these appeals are as follows:

> "That whereas, the shareholders ar desirous of merging and consolidating the properties of their company with the Glidden Company and with a corporation to be incorporated and organized under the laws of Ohio, such merger or consolidation to be effected in the manner hereinafter set forth."

The agreement then stipulates that the shareholders of Metals Refining Company represent that they are the owners of record of stock, that the Metals Refining Company is the owner of all property set forth in its financial statement as of December 31, 1928, and that such statement truly reflects the assets and liabilities as of that date free from all liens and incumbrances, that they will permit an audit and an appraisal to be made by Glidden Company to establish the value of the stock of Metals Refining Company.

The agreement further provides:

"The shareholders agree that they will severally assign, transfer and set over the shares of the Indiana corporation owned by them for the consideration hereinafter set forth, unto a corporation to be organized by the Glidden Company under the laws of the State of Ohio, having the following capitalization:

"Five Thousand (5,000) preferred shares,—par value One Hundred Dollars (100.00) each. Such preferred shares shall entitle the holder thereof to cumulative dividends at the rate of six per centum (6%) per annum, payable quarterly, shall be non-voting, except as otherwise provided by law, to be subject to redemption at any time at the election of the company at par value plus accrued dividends, * * *. The payment of such dividends and the redemption of such stock on or before four (4) years from the date of incorporation shall be guaranteed by the Glidden Company. The company shall have such number of common shares, par or non-par, as the Glidden Company may determine, all of which shall be acquired by Glidden Company for a cash consideration sufficient to meet the requirements of Section 7.

16 "Section 7—The Glidden Company agrees that it will cause to be incorporated and organized under the laws of the State of Ohio a corporation having suitable charter powers and authority to conduct the business of the Indiana company, having a similar name, if it be available, and capitalized as hereinbefore set forth, and upon the transfer of the stock of the shareholders will cause its properties and assets to be conveyed and transferred to the new Ohio company.

"The Glidden Company further agrees that as a consideration for such consolidation, and subject to the approval of the Division of Securities of the Department of Commerce of the State of Ohio, it will issue and deliver or cause to be delivered shares of its own stock and of

the new Ohio company to the shareholders of the Indiana company, and will cause cash payment to be made to them as follows:

"The sound value of fixed assets of the Indiana Company is to be determined by the American Appraisal Company of Milwaukee, Wisconsin. The good will of the Indiana company for the purpose of this agreement shall be valued at Five Hundred Thousand Dollars ($500,000.00). The book value of all other assets as of March 1, 1929, including inventories at the lower of cost or market, less liabilities (including in such liabilities reasonable reserves for discounts, freights and unadjusted claims) as approved by auditors selected by the Glidden Company shall be used.

"Against the total value of the assets so determined there shall be issued—

(a) Up to 5,275 shares of 7% prior preference stock of the Glidden Company on the basis of One Hundred Five Dollars ($105.00) per share.

(b) Up to 5,000 shares of the 6% cumulative preferred stock of the new Ohio Company, hereinbefore referred to, on the basis of One Hundred Dollars ($100.00) per share.

(c) After deducting from the total value of such assets the amount of prior preference stock and preferred stock issued on the basis above set forth, the remaining value of such assets shall represent the amount of cash payable to the shareholders of the Indiana Company on the consummation of such consolidation.

17 Pursuant to the above-quoted agreement the Glidden Company caused to be organized under the laws of the State of Ohio a corporation by the name of Metals Refining Company of Ohio having both preferred and common stock. Soon after the transfer by petitioners of their stock in the Metals Refining Company of Indiana to the new Ohio company of the same name, Glidden and Company which was the owner of all of the voting stock of the new company (100 shares), caused the properties and assets of the Indiana company to be conveyed and transferred to the new Ohio company. The Glidden Company did not receive any shares of preferred stock of the new Ohio company. The Indiana Company was thereafter dissolved.

Pursuant to the agreement of January 29, 1929, the sound value of the assets of the Indiana company including good will was fixed at $1,207,046.66. This sound value represented

the sale price at which the stock was sold and the consideration received by the stockholders consisted of the following:

5,276 shares 7% prior preference stock of Glidden Company at $105.00	$553,950.00
5,000 shares of 6% preferred stock of Metals Refining Company of Ohio at $100.00	500,000.00
Cash	153,036.66
	$1,207,016.66

The petitioners were not consistent in reporting the profit from the foregoing transaction. Most of them, however, reported profit to the extent of the cash received while others reported profit in excess of that sum and in one instance the cash in round figures was reported as a dividend.

18 The Commissioner determined that the Glidden Company was not a party to a reorganization and accordingly treated as taxable income the cash received plus the fair market value of the prior preference stock of the Glidden Company.

The number of shares of stock exchanged and received and the sum of the cash received by the respective petitioners, are as follows:

	Exchanged Shares of Stock	Rec'd Shares of Preferred Stock		
Petitioner	Metals Refining Co. (Ind.)	Metals Refining Co. (Ohio)	Glidden Co.	Cash
Herman C. Groman	500	545	696	$17,293.14
Frank E. Betz	470	530	589	16,231.89
Charles W. Wilson	115	130	137	3,973.95
Mary Wilke, Exec., Est. William Wilke, Dec'd	236	265	279	8,110.94
Erwin L. Wilke	608	695	735	31,272.10
Martha Wilke	104	120	127	3,672.88
William Wilke, Jr.	1,135	1,290	1,362	39,463.46
C. W. Dehning	67	75	79	2,295.56

The applicable provisions of the Revenue Act of 1928 to this proceeding are stated in the margin.[1]

[1] Sec. 112 (b) (3). Stock for Stock of Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization. * * *

Sec. 112 (c) (1). If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

19 It is the contention of the Commissioner that the Glidden Company was not a party to the reorganization. The Commissioner's contention is stated in the deficiency notices, as follows: "It is held that the Glidden Company does not meet the statutory test as to 'a party to the reorganization' as defined in Section 112 (i) (1) (4) of the Revenue Act of 1928. The provision of the 1928 Act to which the Commissioner refers relating to the definition of what constitutes a reorganization, is stated in the margin.[2]

The same contention which the Commissioner makes in these proceedings was made by him in *The Fifth Avenue Bank of New York, Executor of the Estate of Frederick D. Bell, Deceased*, 31 B. T. A., 945, and was decided against him. In that case the taxpayer, Frederick D. Bell was the owner of certain shares of the Lederle Antitoxin Laboratories (hereinafter called Lederle).

20 On February 13, 1930, Lederle entered into an agreement with the American Cyanamid Co., a Maine corporation (hereinafter called Cyanamid), which provided in part as follows:

> 1. Lederle and Cyanamid shall as soon as reasonably may be reorganize by Lederle transferring or causing to be transferred to Cyanamid or to a new corporation to be formed and nominated by Cyanamid, * * * all the properties of Lederle as an entirety * * * but subject to all liabilities of Lederle * * * the said properties embracing, among other things, all the assets, business and good will of Lederle as a going concern * * * the right to use the name "Lederle" and/or "Lederle Antitoxin Laboratories" and/or "Lederle Antitoxin Laboratories, Incorporated" * * *.
>
> 2. In consideration of said transfer and as a part of

---

[2] (i) Definition of Reorganization.—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation, or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however affected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

said reorganization (a) Cyanamid will caused to be delivered to Lederle in such name or names as Lederle may direct sixty-four thousand five hundred (64,500) shares of the duly and legally issued full paid and non-assessable Class "B" Common stock without par value and without any voting rights of Cyanamid, and (b) Cyanamid will cause to be delivered to Lederle in such name or names as Lederle may direct all of the authorized seventy-five thousand (75,000) shares of the no par preferred stock of the new corporation, said preferred stock to be callable at any dividend day at Nineteen and two-thirds Dollars ($19⅔) per share, plus accrued and unpaid dividends thereon * * *; said preferred stock shall be entitled to cumulative dividends at the rate of but not exceeding one and twelve-one-hundredths Dollars ($1.12) per share per annum * * * (c) Cyanamid will cause the transferee of the aforesaid assets to assume the payment of all obligations and indebtedness of Lederle * * *.

It was further agreed that Lederle "as soon as reasonably may be" would change its name, dissolve and liquidate, and distribute to its shareholders the Cyanamid B Stock and the stock of the new corporation.

The new corporation above referred to was organized under the Laws of Delaware as "Lederle Laboratories, Inc." (hereinafter called Laboratories, Inc.), with an authorized capital stock of 1,000 shares common and 75,000 shares preferred stock.

21 Upon organization of Laboratories, Inc., Cyanamid made formal offer to convey or cause to be conveyed all the assets of Lederle which were the subject of the agreement of February 13, 1930, and also all the outstanding stock of Davis & Geck, Inc., which was then owned by Cyanamid. The offer was made in consideration of Laboratories, Inc. issuing all of its 75,000 shares of preferred stock to Lederle or its nominees, and all of its 1,000 shares of common stock to Cyanamid.

The offers and agreements above mentioned were duly submitted to and approved by the directors and stockholders of the several corporations.

The several agreements were consummated, and on February 13, 1930, Laboratories, Inc., issued 1,000 shares of its common stock to Cyanamid and 75,000 shares of its preferred stock to the stockholders of Lederle. At the same time Cyanamid issued 64,300 shares of its B common stock to the stock-

holders of Lederle. At the same time Lederle formally changed its name to Lynbell Corporation and on June 5, 1930, was dissolved.

On these facts which we have stated above, the Commissioner contended Cyanamid was not a party to the reorganization and that the 64,500 shares of its B common stock which it issued to the stockholders of Lederle was a part of the gain which was to be recognized, and was not freed from tax recognition by the provisions of Section 112 (b) (3), Revenue Act of 1928.

As has already been stated, we held against the contention of the Commissioner and held that Cyanamid was a party to the reorganization. On that point we said:

> Examining some of the steps taken in connection with the transfer of property and exchange of securities, it is to be noted that the principal underlying agreement is
> 22 that of February 13, 1930, between Lederle and Cyanamid. Therein Lederle agreed to transfer its properties "to Cyanamid or to a new corporation to be formed and nominated by Cyanamid." As part of the consideration under this agreement Cyanamid agreed to issue 64,500 shares of Class B common stock to Lederle or its nominees. The directors of Cyanamid formally approved the agreement, approved the organization of Laboratories, Inc. and authorized the transfer to it of all the stock of Davis & Geck, Inc., then owned by Cyanamid. The transfer of Lederle properties to Laboratories, Inc., was accomplished, not as a consequence of direct negotiations between those two, but as the result of an offer by Cyanamid to "convey or cause to be conveyed" to Laboratories, Inc., all of the properties of Lederle. Cyanamid obtained actual control of the new corporation by the acquisition of all of its common stock. This outline of Cyanamid's participation in the reorganization indicates that it was in a very substantial way "a party to the reorganization." It was so intimately connected with the several transactions which resulted in the statutory reorganization that in our opinion it must be held to be a party to the reorganization within the statutory sense of the term. The situation here is very similar to that of *Tulsa Oxygen Co.*, 18 B. T. A. 1283. In that case the Tulsa Oxygen Co. agreed to sell its properties to the Union Carbide & Carbon Corporation for stock of the latter. A contract was subsequently drawn designating a subsidiary of Union

Carbide & Carbon as the transferee, but upon the actual transfer the Tulsa Oxygen Co. parceled out its assets to several of Union Carbide & Carbon's subsidiaries by direct assignments without regard to the contract. We held that the transaction was a statutory reorganization and that gain was not to be recognized upon the Tulsa Oxygen Co.'s receipt of the stock for its assets. We said in part:

> It is apparent that the transaction here involved almost literally satisfies the statutory definition of a non-taxable corporate reorganization. It is clear that the transaction was between the petition and the Union Carbide & Carbon Corporation. All details of the sale were worked out in advance between them and payment made, in accordance with such agreement, out of the stock of this holding corporation. The substitution, therefore, of the name of a subsidiary corporation, in the contract at the suggestion of the attorney was a mere expediency that in no practical way changed the status of the parties responsible for the deal. * * *

While in the *Tulsa Oxygen Co.* case we did not directly discuss the matter of whether Union Carbide & Carbon was "a party to the reorganization," it must necessarily have been; otherwise, the receipt of its stock would have been subject to the gain or loss provisions. We are of the opinion that in this case Cyanamid was a party to the reorganization, and accordingly its stock was received by Bell without recognition of gain.

Summarizing what we have said thus far, we hold that both Laboratories, Inc. and Cyanamid stock were received by Bell without recognition of gain. Consequently respondent's motion for an increased deficiency, on the ground of the exchange of stock for stock being a taxable transaction, is denied.

23 *The Fifth Avenue Bank of New York, Executor, supra,* was a well considered case and for the reasons which we have stated, is controlling here. Consequently we hold that both the shares of 7% prior preference stock of Glidden Company and the shares of 6% preferred stock of Metals Refining Company of Ohio were received by petitioners without recognition of gain. The cash received must of course be recognized for taxation in accordance with the provisions of Section 112 (c) (1) which we have quoted in the margin.

Decision will be entered under Rule 50.

Entered: Jun 17, 1935.

24 UNITED STATES BOARD OF TAX APPEALS. Entered Aug 1935.

* * (Caption—62930) * *

DECISION.

This proceeding having been called on the Day Calendar for hearing under Rule 50 of the Board's Rules of Practice and the respondent having filed his notice of settlement with statement of recomputation attached, which statement was not contested by the petitioner and which was in accordance with the Board's memorandum opinion in this proceeding entered June 17, 1935, it is:

Ordered and Decided that there is a deficiency in income tax of the above-named petition for the year 1929 in the amount of $17.53.

(Seal) *Member.*
Entered Aug 8 1935

25 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed Oct. 1935.

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner*, *vs.* Herman C. Groman, *Respondent.* } Docket No. 62930.

PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS AND ASSIGNMENTS OF ERROR.

Filed Oct 30 1935.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Claude R. Mar-

shall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction.

That the petitioner on review (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

26 The respondent on review, Herman C. Groman, (hereinafter referred to as the taxpayer) is an individual residing at 7 Wildwood Road, Hammond, Indiana, and was residing at the same address and place at the time of his Federal individual income tax return for the calendar year 1929 was filed, and is an inhabitant of the judicial circuit of the United States Circuit Court of Appeals for the Seventh Circuit. Said Herman C. Groman filed his Federal income tax return for the calendar year 1929 with the Collector of Internal Revenue for the District of Indiana, located at Indianapolis, Indiana, within the judicial circuit of the United States Circuit Court of Appeals for the Seventh Circuit.

II.

On January 19, 1932, the Commissioner of Internal Revenue determined a deficiency in income tax against the respondent on review, the taxpayer, for the calendar year 1929, in the amount of $7,420.05, and sent the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter, on March 17, 1932, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals contesting the total deficiency determined. The Commissioner filed his answer to the petition on April 26, 1932.

The case came on for hearing before the said Board of

27 Tax Appeals on March 6, 1934, having been consolidated for hearing and decision on the same day with the associated appeals of Frank S. Betz, Docket No. 62931; Charles W. Wilson, Docket No. 62932; Mary Wilke, Executrix, Estate of William Wilke, Docket No. 62933; Erwin L. Wilke, Docket No. 62934; Martha Wilke, Docket No. 62935; William Wilke, Jr., Docket No. 62936, and C. H. Dehning, Docket No. 62937.

On June 17, 1935, the Board of Tax Appeals promulgated and entered its consolidated memorandum opinion and on August 8, 1935, said Board of Tax Appeals entered its final decision and order of redetermination wherein and whereby it ordered and decided that there is a deficiency in tax for the year 1929 in the amount of $17.53.

Petitioner on review seeks a review of the Board's decision by virtue of the provisions of the Revenue Act of 1926, Sections 1001-1003, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1932, Section 1101 c. 209, 47 Stat. 169.

III.

Nature of the Controversy.

Prior to January 29, 1929, the respondent herein owned 500 shares of common capital stock of the Metals Refining Company of Indiana (hereinafter sometimes referred to as the "Indiana Company" and the "old corporation"), which had an authorized capital stock of $500,000.00, consisting of 5,000 shares of a par value of $100 each of which 4,421 were issued and outstanding on January 29, 1929. The Glidden Company (hereinafter sometimes referred to as the "new corpo-
28 ration") was an Ohio corporation. On January 29, 1929, an agreement was executed by and between the Glidden Company and the stockholders of the Indiana Company to the effect that the latter were desirous of merging and consolidating the properties of their company and that of the Glidden and that the same would be effected substantially as follows:

(1) A new corporation was to be organized under the laws of Ohio by the Glidden Company with 5,000 shares of preferred stock—no par value of $100 each with cumulative dividends—non-voting redemption on or before four years to be guaranteed by the Glidden Company, and such number of common voting shares, par or non-par value as may be determined by the Glidden Company, all of which common was to be acquired by the Glidden Company for cash. (One hundred shares were acquired. The new corporation was to carry on the business of the Indiana Company under a similar name;

(2) The sound value of the assets of the Indiana Company was to be fixed at $1,207,046.66, including good will of $500,000, which was to represent the sales price. Against the total sound value of the said assets there were to be issued;

(a) up to 5275 shares of 7% prior preference stock of the Glidden Company on basis of $105 per share; (b) up to 5000 shares of the 6% cumulative preferred stock of the new Ohio Company on the basis of $100.00 per share; and (c) after deducting from the total value of such assets the amount of stock set forth in (a) and (b), the remaining value of
29 such assets shall represent the amount of cash payable to the shareholders of the Indiana Company on the consummation of such consolidation.

(3) The respondent herein and the other shareholders agreed to assign and transfer their shares in the Indiana Company to the new corporation for the following consideration, if Glidden Company would cause the assets of the Indiana Company to be transferred to the new corporation:

(a) 5,276 shares of 7% prior preference stock of Glidden Co. at $105	$553,980.00
(b) 5,000 shares of 6% preferred stock of Indiana Co. of Ohio (new corporation) at $100	500,000.00
(c) Cash (remanding value of assets)	153,036.66
Total sound value of assets	$1,207,016.66

The above agreement was carried out and the Indiana Company was thereafter dissolved.

As a result of the above transaction the taxpayer received in 1929 for his 500 shares of common stock of the Metals Refining Company, cash of $17,293.14; 596 shares of preferred stock of Glidden Company, and 565 shares of preferred stock of Metals Refining Company of Ohio.

The taxpayer reported on his income tax return for the year 1929 as dividends the cash received in the round figures of $17,300.00.

In the audit of the return the Commissioner determined that the Glidden Company was not a party to a reorganization within the meaning of Section 112 (i)(2) and 112 (b)(3) of the Revenue Act of 1928 and accordingly considered the transaction a taxable exchange and computed as taxable
30 income the cash received, $17,293.14, plus the fair market value of the 596 shares of prior preference stock of the Glidden Company ($105.00 per share) $62,580.00 or a

total of $79,873.14 as provided by Section 112 (c)(1) of the Revenue Act of 1928, as follows:

Cash received—	$17,293.14
596 shares Glidden Co. pfd. @ $105.00	62,580.00
565 shares Metal Refining Co. @ $100.00	56,500.00
Total consideration	$136,373.14
Cost of 500 shares Metal Refining Co. of Indiana	40,350.00
Profit on exchange	$ 96,023.14
Taxable profit not in excess of cash and fair market value of "other property" (Sec. 112 (c)(1) Revenue Act of 1928)	
Cash—	17,293.14
Market value Glidden Co.	62,580.00
Profit taxable	$79,873.14

The Board of Tax Appeals held that the Glidden Company was a party to a reorganization within the statutory sense of the term and relied on its former decision in the case of *The Fifth Avenue Bank of New York, Exec., Estate of Bell,* 31 B. T. A. 945; (on appeal to U. S. Circuit Court of Appeals for the Third Circuit) and determined that both the shares of 7% prior preference stock of Glidden Company and the shares of 6% preferred stock of the Metals Refining Company of Ohio were received without recognition of gain and that the cash received must be recognized for taxation in accordance with the provisions of Section 112 (c)(1) of the said Revenue Act of 1928.

The question therefore is whether the Glidden Company is a party to a reorganization embracing the old Indiana
31 corporation and the new Ohio corporation within the meaning of Section 112 (b)(3) and 112 (i)(2) of the Revenue Act of 1928.

IV.

Assignments of Error.

The Commissioner says in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board

of Tax Appeals, manifest errors occurred and intervened to the prejudice of the Commissioner and the Commissioner assigns the following errors, and each of them which he avers occurred:

1. That the Board of Tax Appeals erred as a matter of law in holding and concluding that the Glidden Company was "a party to a reorganization."

2. That the Board of Tax Appeals erred as a matter of law in holding and concluding that the Glidden Company was a party to a reorganization embracing the Metals Refining Company of Indiana and a new corporation organized under the laws of the State of Ohio within the meaning of Sections 112 (b) (3) and (4) and 112 (i) (2) of the Revenue Act of 1928.

3. That the Board of Tax Appeals erred as a matter of law in holding and deciding that the fair market value of shares of 7% prior preference stock in the Glidden Company was received by the taxpayers in 1929 in an exchange without recognition of gain.

4. That the Board of Tax Appeals erred as a matter
32 of law in holding and deciding that the fair market value of shares of 7% prior preference stock of the Glidden Company was received by the taxpayer in 1929 upon exchange was non-taxable within the meaning of Section 112 (b) (3) of the Revenue Act of 1928.

5. That the Board of Tax Appeals erred as a matter of law in not holding and deciding that the fair market value of the shares of 7% prior preference stock of the Glidden Company received by the taxpayers in an exchange, in addition to cash, was taxable gain within the meaning of Section 112 (c) (1) of the Revenue Act of 1928.

6. That the Board of Tax Appeals erred in not determining the deficiency in tax due from the taxpayer for the year 1929 to be in the amount of $7,420.05.

7. That the Board of Tax Appeals erred in determining that the deficiency in tax due from this taxpayer for the year 1929 was only $17.53.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of the record be prepared in accordance with the law and the rules of said Court for filing, and that appro-

priate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) FRANK J. WIDEMAN
Frank J. Wideman,
Assistant Attorney General.

(Sgd.) ROBERT H. JACKSON
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney, Bureau of Internal Revenue.

33 United States of America }
District of Columbia. } ss.

CLAUDE R. MARSHALL, being duly sworn, says that he is a special attorney for the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) CLAUDE R. MARSHALL.

Sworn and subscribed to before me this 16th day of October, 1935.

GEORGE W. KRIES,
Notary Public.

My commission expires Nov. 16, 1937.

Nov. 5. 34 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—62930) • •

NOTICE OF FILING PETITION FOR REVIEW.

Board of Tax Appeals Filed Nov. 5, 1935.

To: David L. Krebs, Jr., Esq.
c/o Armour & Company,
Union Stock Yards,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of October, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of October, 1935.

(Sgd.) ROBT. H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 5 day of Nov. 1935.

D. L. KREBS, JR.,
(Seal) *Attorney for Respondent on Review.*

35 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—62930) • •

NOTICE OF FILING PETITION FOR REVIEW.

Board of Tax Appeals. Filed Nov. 8, 1935.

To: Herman C. Groman,
7 Wildwood Road,
Hammond, Indiana.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of October, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Cir-

cuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of October, 1935.

(Sgd.) ROBT. H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 2 day of Nov. 1935.

(Signed) HERMAN C. GROMAN,
Respondent on Review.

39 UNITED STATES BOARD OF TAX APPEALS. Entered Dec. 1935.

* * (Caption—62930) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to January 29, 1936.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
Dec. 10, 1935.
jd

Now, February 19, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Jan. 29, 40 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—62930) * *

ODER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to March 2, 1936.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
Jan. 29, 1936.
jd

Now, February 19, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

n. 21, 1936. 36 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—62930) * *

PRAECIPE FOR RECORD.

Board of Tax Appeals. Filed Jan. 21, 1936.

Received Jan. 21, 1936. U. S. Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceeding before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter;
(b) Answer.
3. Memorandum Opinion and Decision of Board promulgated and entered June 17, 1935.

4. Final decision or Order of Redetermination entered on August 8, 1935.

5. Petition for Review, together with Proof of Service of Notice of Filing petition for review, and of a copy of Petition for Review on taxpayer and on his counsel.

6. Orders enlarging time for prepartion of the evidence and for the transmission and delivery of record, not included in record.

7. This praecipe.

37 Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

(Signed) HERMAN OLIPHANT,
Herman Oliphant,
General Counsel for the Department of the Treasury.

Date: January 9, 1936.

Service of a copy of the within Praecipe is hereby admitted this 14th day of January, A. D. 1936.

D. L. KREBS, JR.,
CRM-spt *Attorney for Respondent.*

38 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—62930) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 37, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 19th day of February, 1936.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 29, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the eighth day of May, 1936, upon which the following entitled cause was heard and determined:

Commissioner of Internal Revenue,
Petitioner,

vs.

Herman C. Groman,
Respondent,

No. 5779, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of March, A. D. 1937.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Commissioner of Internal Revenue, *Petitioner,*
5779 *vs.*
Herman C. Groman,
} Petition for Review of Decision of the United States Board of Tax Appeals.

And, to-wit: On the twenty-sixth day of February, 1936, there was filed in the office of the Clerk of this court, a Motion as to Printing Record, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,*
vs.
Herman C. Groman, *Respondent.*
} B. T. A. No. 62930.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,*
vs.
Frank S. Betz, *Respondent.*
} B. T. A. 62931.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,*
vs.
Charles W. Wilson, *Respondent.*
} B. T. A. No. 62932.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Mary Wilke, Executrix, Est. of William Wilke,
Respondent.
} B. T. A. No. 62933.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Erwin L. Wilke,
Respondent.
} B. T. A. No. 62934.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Martha Wilke,
Respondent.
} B. T. A. No. 62935.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
William Wilke, Jr.,
Respondent.
} B. T. A. No. 62936.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
C. H. Dehning,
Respondent.
} B. T. A. No. 62937.

MOTION.

Comes Now the Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, and Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully represents to the Court that the identical question of law is involved in each of the above cases; that the decision of this Court in one of

the cases will govern the decision in the others; that the cases were consolidated for hearing and decision before the United States Board of Tax Appeals; that the Board, in its Findings of Fact and Opinion, covered all of the cases above mentioned and that the record on appeal, which has been forwarded by the Clerk of the United States Board of Tax Appeals to the Clerk of this Court, is sufficient in each of the cases to fully present the question of law involved.

Wherefore, petitioner moves this Court that it enter an order that only the record in Docket No. 62930 be printed; further that further proceedings in Dockets Nos. 62931, 62932, 62933, 62934, 62935, 62936 and 62937 be suspended, until the determination of the Board of Tax Appeals becomes final, within the meaning of Section 1005 (a), Revenue Act of 1926, in Docket No. 62930, and that upon such final determination in Docket No. 62930, either party hereto may apply, upon written notice to the other party and upon this order and a certified copy of the final determination in Docket No. 62930, for an order directing judgment to be entered in the cases of petitions for review in Dockets Nos. 62931, 62932, 62933, 62934, 62935, 62936 and 62937, corresponding to the result in Docket No. 62930.

FRANK J. WIDEMAN,
Frank J. Wideman,
Assistant Attorney General.
ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Consented to:
DAVID W. KREBS, JR.,
Attorney for Respondents.

Endorsed: Filed February 26, 1936, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of February, 1936, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 26, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
5779 *vs.*
Herman C. Groman,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5780 *vs.*
Frank S. Betz,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5781 *vs.*
Charles W. Wilson,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5782 *vs.*
Mary Wilke, Executrix, Est. of
William Wilke,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5783 *vs.*
Erwin L. Wilke,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5784 *vs.*
Martha Wilke,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5785 *vs.*
William Wilke, Jr.,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5786 *vs.*
C. H. Dehning,
Respondent.

Petitions for Review of Decisions of the United States Board of Tax Appeals.

ORDER.

Upon consideration of the Motion filed herein by the petitioner, praying that this Court, for the purpose of review by this Court, order that only the record in Cause No. 5779 be printed; and that further proceedings in Cause Numbers 5780, 5781, 5782, 5783, 5784, 5785 and 5786 be suspended until the determination of the Board of Tax Appeals becomes final, within the meaning of Section 1005(a), Revenue Act of 1926, in Cause Number 5779, and that upon such final determination in Cause Number 5779 either party hereto may apply, upon written notice to the other party and upon this order and a certified copy of the final determination in Cause Number 5779, for an order directing judgment to be entered in the cases of petitions for review in Docket Numbers 5780, 5781, 5782, 5783, 5784, 5785, and 5786, corresponding to the result in Cause Number 5779.

It is by this Court,

Ordered that said Motion be and it is hereby granted, and further ordered that said Motion and this Order be incorporated in the transcript of record printed in board of Tax Appeals Cause Number 5779.

And afterwards, to-wit: On the twenty-first day of March, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 5779. October Term, 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman.

The Clerk will enter our appearance as counsel for Respondent.

Egbert Robertson,
James C. Spence,
120 W. Adams St, Chicago

Endorsed: Filed March 21, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the third day of April, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779 October Term 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman.

The Clerk will enter our appearance as counsel for Petitioner.

ROBERT H. JACKSON,
Asst. Attorney General,
SEWALL KEY,
Special Asst. to. Atty. General,
Washington, D. C.

Endorsed: Filed April 3, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-third day of May, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779 October Term 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman,

The Clerk will enter our appearance as counsel for Petitioner:

HERMAN OLIPHANT,
G. C. Dept. of Treasury,
JOHN F. GREANEY,
Special Attorney,
Washington, D. C.

Endorsed: Filed May 23, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the first day of June, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779 October Term 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman,

The Clerk will enter my appearance as counsel for Petitioner.

JOSEPH M. JONES,
Special Asst. to the Attorney General,
Washington, D. C.

Endorsed: Filed June 1, 1936. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, 1936, of the October Term, in the year of our Lord one thousand nine hundred and thirty-six, and of our Independence the one hundred and sixty-first.

And afterwards, to-wit: On the twelfth day of November, 1936, the following further proceedings were had and entered of record, to-wit:

Thursday, November 12, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Commisisoner of Internal Revenue,
5779 *vs.*
Herman C. Groman.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral arguments by Mr. Joseph M. Jones, counsel for Petitioner, and by Mr. James C. Spence, counsel for Respondent, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the sixteenth day of November, 1936, there was filed in the office of the Clerk of this court, a Motion for Leave to file Additional Authorities, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779.

Commissioner of Internal Revenue,
Petitioner,
vs.
Herman C. Groman,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

MOTION.

Now comes Herman C. Groman, by Egbert Robertson and James C. Spence, his attorneys, and moves the court that leave be given to file instanter as an additional authority in this cause, Article 577 of Regulations 74 under the Revenue Act of 1928, and particularly that portion thereof underlined in the copy thereof attached to this motion, and that if said motion be granted, said attached copy be filed herein as such additional authority.

Said respondent shows that said excerpt from Regulation 74 is relevant and important in the decision of this cause and was, by inadvertence, not cited in the briefs filed herein or upon the oral argument herein.

EGBERT ROBERTSON,
JAMES C. SPENCE,
Attorneys for Respondent.

Endorsed: Filed November 16, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of November, 1936, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 5779. October Term, 1936, October Session, 1936.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
HERMAN C. GROMAN,
Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals.

November 30, 1936.

Before EVANS, *Circuit Judge,* and LINDLEY and BRIGGLE, *District Judges.*

EVANS, *Circuit Judge.* The Commissioner appeals from a ruling of the Board which held that the stock under consideration, received by respondent, was not taxable to him as gain because received in the course of a reorganization.

The Facts. Respondent was a stockholder in the Metals Refining Company, an Indiana corporation. The Glidden Company is an Ohio corporation. On January 29, 1929, the Glidden C. npany and all the stockholders of Metals Company entered into an agreement whereby all the stock of the Metals Company was to be transferred to a third company (Metals Refining Co. of Ohio), an Ohio corporation, to be formed by the Glidden Company. The consideration to the stockholders of Metals Company for the transfer was $153,036.66 cash; 5276 shares of 7% prior preferred stock of the Glidden Company at $105 per share; and 5000 shares of 6% cumulative preferred stock of the new company.

Each shareholder of the Indiana corporation, of which respondent was one, received the percentage of this total consideration that his stock holdings bore to the total outstanding stock of said Indiana company. Glidden Company paid cash for the common stock of the new Ohio company. It did not receive any of the preferred stock of this company. The Indiana company was dissolved. Its assets were valued at $1,207,046.66. It is admitted that the cash received by stockholders was taxable and also that respondent's proportion of the 5000 shares of the preferred stock of the new Ohio Company by him received was not taxable. The issue is limited to respondent's proportion of 5276 shares of preferred stock of Glidden Company.

Did the Board of Tax Appeals correctly hold that the Glidden Company was a party to a reorganization within the meaning of section 112 (i) (2) of the Revenue Act of 1928?

The pertinent reorganization sections are:

"SEC. 112 (a) GENERAL RULE. Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

"SEC. 112 (b) * * (3) STOCK FOR STOCK ON REORGANIZATION. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

"(4) SAME—GAIN OF CORPORATION. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization. * * *

"(5) (c) GAIN FROM EXCHANGES NOT SOLELY IN KIND. (1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

"(2) If a distribution made in pursuance of a plan of

reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property. * * *

"(i) DEFINITION OF REORGANIZATION. As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

"(j) DEFINITION OF CONTROL. As used in this section the term 'control' means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

The recent decisions of the courts which have passed upon similar questions reject the respondent's contention that he was within the exemption of the reorganization section. In other words, the following cases, while not exactly in point, are persuasive. *Bus and Transportation Co.* v. *Helvering*, 296 U. S. 387; *G. & K. Manufacturing* v. *Helvering*, 296 U. S. 389; *Ballwood Co.* v. *Commissioner*, 84 F. (2d) 733.

Determinative of the question before us is the answer to the

question, Was Glidden a party to reorganization whereby the Indiana Company transferred its stock to the Ohio Company and the latter paid the stockholders of Indiana Company in cash, preferred stock of Ohio Company, and preferred stock of Glidden Company?

We see no reason for extending the meaning of the term "party" as it appears in section 112 (i) (2). To hold otherwise would be to usurp legislative functions. Congress has defined a party to a reorganization so as to permit a taxpayer to avoid what would otherwise be taxable income. It could have refused to allow such deductions altogether. Having exempted "gains" through reorganization, it could and did define reorganizations. In so doing it used the term "a party" referring to those who were in the reorganization. We must hold respondent to the definition which Congress specifically gave to the word "party." It would, we think, be a forced construction to assume that under such circumstances there were parties other than those defined by the statute. Respondent relies upon the exemption of the statute, but declines to abide by the Congressional definition of essential terms.

The conclusion here reached is confirmed if we view the transaction from another approach. Let us assume that we have a taxpayer who owns stock in a corporation which he sells to another corporation. He is paid partly in cash, chiefly in preferred stock of a third corporation, and the balance in preferred stock of a corporation which buys his stock. The price received is in excess of the cost of the stock to him. Is his gain taxable?

There can be no question about the correctness of an affirmative answer save for an alleged exception or exemption from the tax law due to the reorganization provision of the act. The cash received, of course, is not exempt. The taxpayer does not question the tax upon the cash by him received. The Government concedes the soundness of the taxpayer's claim of exemption so far as the stock of the acquiring corporation is concerned. In the face of this concession this item like the cash item is out of the picture. As to the stock of a third company, even though it be a parent company, there seems no reason for exempting it any more than could be advanced for exempting the cash. Instead of preferred stock of the third company, it might have been bonds of the third or a fourth company, or real estate or physical personal property. The reason for exempting the stock of the purchasing company does not apply.

Our conclusion, however, is based not upon the reasons for Congressional action, but upon the fact that Congress, in exempting gains derived through the transfer of stock which transfers are but a part of reorganizations, saw fit to define with particularity the terms "reorganization" and "parties to reorganization." As we apply these definitions to the facts before us, we are impelled to the conclusion that the Glidden preferred stock was not exempted.

The order is reversed, with directions to proceed in accordance with the views herein expressed.

Endorsed: Filed November 30, 1936. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the thirtieth day of November, 1936, the following further proceedings were had and entered of record, to-wit:

Monday, November 30, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

5779 Commissioner of Internal Revenue, *vs.* Herman C. Groman. } Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the Record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the decision entered in this cause on August 8, 1935, by the United States Board of Tax Appeals be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to proceed in accordance with the views expressed in the Opinion of this court.

And afterwards, to-wit: On the nineteenth day of December, 1936, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the seventh day of January, 1937, the following further proceedings were had and entered of record, to-wit:

Thursday, January 7, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Commissioner of Internal Revenue, 5779 *vs.* Herman C. Groman.	Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the court that the Petition for a Rehearing is this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-first day of January, 1937, the Mandate of this court issued to the Clerk of the United States Board of Tax Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 33 to 48, inclusive, contain a true copy of the proceedings had and papers filed (excepting Briefs of counsel and Petition for a Rehearing); in the case of

Commissioner of Internal Revenue,
Petitioner,

vs.

Herman C. Groman,
Respondent,

No. 5779, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of March, A. D. 1937.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.